

1501715 (Migration) [2016] AATA 3138 (25 January 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Xuong Hung Le

VISA APPLICANT: Ms Sophany Soun

CASE NUMBER: 1501715

DIBP REFERENCE(S): OSF2014/051153

MEMBER: Margie Bourke

DATE: 25 January 2016

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.216 of Schedule 2 to the Regulations.

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Statement made on 25 January 2016 at 1:55pm

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 2 April 2014. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.300.216.
3. The delegate refused to grant the visa on 8 January 2015 on the basis that the visa applicant did not satisfy cl.300.216 of Schedule 2 to the Regulations because the delegate was not satisfied that the visa applicant and review applicant were in a genuine and continuing relationship or intended to be in a genuine and continuing relationship, and therefore was not satisfied that they genuinely intended to live together as spouses.
4. The review applicant appeared before the Tribunal on 25 January 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the review applicant's cousin, and the visa applicant gave evidence via telephone. The Tribunal hearing was conducted with the assistance of an interpreter in the Khmer and English languages.
5. The review applicant was represented in relation to the review. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the parties genuinely intended to live together as spouses at the time of application.

DO THE PARTIES GENUINELY INTEND TO LIVE TOGETHER?

8. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). Whilst it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.

9. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings.
10. The visa applicant told the Tribunal that she had been married previously and the marriage had been recognised but not officially registered. The visa applicant stated she had applied for permission to marry but had never formally registered that marriage. The Tribunal has considered the divorce document provided by the visa applicant, which is consistent with the visa applicant's evidence. The review applicant stated to the Tribunal that he had never seen a marriage certificate. The Tribunal has considered that in the Department's decision record dated 8 January 2015, a copy of which was provided to the Tribunal by the review applicant, the delegate refers to the review applicant stating that he had sighted a marriage certificate. The Tribunal accepts that the review applicant had never seen a registered marriage certificate, but may have seen other documents relevant to the visa applicant's divorce. The Tribunal is satisfied based on the evidence before it that the visa applicant's previous marriage and divorce was not registered formally, and the evidence available to the Tribunal does not indicate that the visa applicant cannot validly marry in Australia.
11. Based on the evidence before it the Tribunal is satisfied that the review applicant and visa applicant were introduced to each other through the review applicant's younger half brother. The Tribunal is satisfied that the review applicant went to Cambodia in October 2012 with the express purpose of meeting the visa applicant and spending time with her. The Tribunal is satisfied that the review applicant went to Cambodia on 16 October 2012 and returned to Australia on 16 December 2012. The Tribunal is satisfied that the review applicant returned to Cambodia on 18 May 2013 and stayed till 5 July 2013. The Tribunal is satisfied that the review applicant returned to Cambodia in January 2014 and the parties became engaged in a ceremony on 9 February 2014. Based on the evidence before it the Tribunal is satisfied that on his visits to Cambodia that the review applicant stayed at the visa applicant's home, and that they travelled together to Vietnam and Thailand. However the Tribunal accepts that the parties did not live together as husband and wife until after the engagement on 9 February 2014.
12. The Tribunal accepts that the parties have never established their own household, and that at the time of application the review applicant had given the visa applicant some cash but there was no record of any financial support that he had provided. The Tribunal accepts that there is photographic evidence of the engagement ceremony. The evidence before the Tribunal is that no members of the review applicant's family from Australia attended the engagement ceremony in Cambodia. The Tribunal accepts that some of the review applicant's relatives in Cambodia attended the engagement ceremony. The Tribunal has considered that there is a significant age difference between the visa applicant and the review applicant. The Tribunal also accepts that this is an issue that has been discussed between the parties.
13. The Tribunal notes the consistent evidence of the review applicant and the visa applicant in relation to their future plans. The Tribunal accepts that the visa applicant intends to reside with the review applicant immediately upon her arrival in Australia, and that they have discussed their marriage including the celebrant and the type of venue. The Tribunal also accepts that the parties have discussed and planned that the visa applicant will study English and that she hopes to obtain some employment. The Tribunal has also considered that the parties both told the Tribunal that the visa applicant hopes to have a child with the review applicant. The Tribunal accepts that the review applicant and visa applicant have discussed that the review applicant's adult children would continue to reside with them. The Tribunal accepts that the review applicant and visa applicant had discussed that the visa applicant would assist with cooking, and arrangements in the house. The Tribunal gives weight to the evidence of the visa applicant which demonstrated her breadth of knowledge of the review

applicant's children and their lives; the Tribunal notes that in the Department's decision record dated 8 January 2015, the delegate noted the visa applicants superficial and limited knowledge of the review applicant's life and family. The Tribunal noted in the hearing the visa applicant was able to give detailed information in response to questions about the review applicant's family. The Tribunal accepts that the review applicant's children do not speak Khmer, and the visa applicant has very limited conversations with his children.

14. The Tribunal has given weight to the evidence of the review applicant's cousin who stated he had spoken to the visa applicant on the phone, and that he had regular, almost daily contact with the review applicant. The Tribunal accepts that the review applicant's cousin was aware the review applicant wanted to marry the visa applicant, had constant communication with her by telephone and his understanding was that they intended to live as husband and wife as soon as the visa applicant came to Australia. The Tribunal noted the evidence of the review applicant's cousin that the review applicant was looking forward to having someone as his companion and someone whom he could rely on. The Tribunal accepts this evidence was relevant at the time of application, and continues to confirm the existence of those facts after the time of application.
15. The Tribunal has considered the evidence before it and accepts that the visa applicant was told by the review applicant that he could financially support her, but also that she intended to get some employment. The Tribunal also accepts that the visa applicant hoped to have a child with the review applicant. The Tribunal is satisfied the review applicant and visa applicant had consisted intentions in relation to their household plans. The Tribunal is satisfied based on the oral and written evidence before it that the parties had demonstrated to family and friends at the time of application and that they intended to marry one another and lived together as spouses. The Tribunal is satisfied that the parties gave consistent evidence of their commitment to each other and plans for the future. The Tribunal is satisfied that the evidence of the parties' intentions in relation to the circumstances of the relationship is evidence that they genuinely intended to live together as spouses at the time of application. The Tribunal is satisfied that the evidence of the review applicant and the visa applicant was evidence that the parties intended to live together as spouses in a relationship that both parties considered to be a genuine and continuing relationship at the time of application.
16. The Tribunal has considered the evidence before it and is satisfied that the oral and written evidence is sufficient evidence that at the time of application the parties genuinely intended to live together as spouses.
17. At the time of application the parties did a genuine intention to live together as spouses, and therefore cl.300.216 is met.
18. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

19. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
 - cl.300.216 of Schedule 2 to the Regulations.
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Margie Bourke
Member